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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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**No. 76-701**

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JOHN J. BRENNAN,  
*Petitioner,*

versus

UNITED STATES OF AMERICA,  
*Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit

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**PETITIONER'S REPLY TO MEMORANDUM IN  
OPPOSITION FILED BY THE UNITED STATES**

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In response to the petition for writ of certiorari filed in this cause, the respondent, United States of America, urges that this Court reject both Fourth Amendment contentions advanced by the petitioner.

In so arguing, the government has misstated material facts and has made factual allegations that are not supported by the record that was before the lower court. These allegations are not only inaccurate but are often precisely contrary to the evidence as the petitioner will show.

Pursuant to Rule 21 of this Court, the petitioner has requested that the suppression hearing transcripts be lodged with the Clerk of this Court. References to these transcripts will be by "R." followed by a page number.

The government's memorandum states: "[a]t approximately 1:30 p.m. on May 18, 1975, \* \* \* after the airport control tower had closed, the [searching] agents sighted petitioner's plane landing without its lights and taxiing towards its hangar." (Memorandum in Opposition at 3). There was no testimony in this case that the Melbourne, Florida, Regional Airport was closed at 1:30 a.m. on May 18, 1975. The Director of Aviation at the airport did testify that the control tower at the airport was not manned from midnight until 6:00 a.m. (R. 415). However, he also testified that the flight service station at the airport is manned twenty-four hours a day and provides landing and take-off instructions for aircraft after the control tower is closed (R. 415). Thus, aircraft normally land at this airport twenty-four hours a day, and, although the control tower is not manned, the airport was not closed or deserted at 1:30 a.m. on the night of May 18, 1975.

In addition, both of the searching officers who testified at the suppression hearing said that they first saw a Beagle aircraft on the night of May 18, 1975 (which they later identified as N569MA), when it was *taxiing on the ground* along a *taxiway* to the Rathman hanger (R. 397-399, 578, 583). It is physically impossible for an airplane to land on a taxiway, which is a narrow area extending off a runway. There was absolutely no eye-witness testimony as to when N569MA landed at the airport, even if it is conceded that the airplane departed on the morning of May 17, 1975, as the government claims (Pet. App. 3a, n. 1). This aircraft could have returned to the Melbourne airport at any time prior to 1:30 a.m.

The government emphasizes that aircraft N569MA was landing without its lights on. However, one agent's testimony implied that the aircraft did have its lights on (R. 583). There is nothing in this record to show that taxiing aircraft normally have exterior lights on. Thus, the absence of exterior lights on N569MA was not suspicious behavior.

In its memorandum, the government takes the position that "[u]pon encountering a police officer, petitioner abruptly changed his direction and headed back toward the hangar, where he was intercepted by the agents" (Memorandum in Opposition at 3). In fact, the testimony at the suppression hearing showed that petitioner exited the hangar and headed toward a nearby automobile. After encountering a local police officer and talking to him momentarily, the petitioner started to walk toward the closed hangar doors. As he was walking away from the hangar, he was placed in custody by the agents at a point some twenty to twenty-five feet from the closed hangar doors (R. 400, 566, 580, 583). The petitioner did not abruptly change his direction or attempt to elude the police officer.

The automobile parked near the hangar was not registered to the petitioner as the government claims (Memorandum in Opposition at 3). The petitioner testified that although he legally possessed the automobile, its registration was not in his name because he had recently purchased the car, and the transfer of title had not taken place on May 18, 1975 (R. 593). Thus, the agent's hearsay testimony that prior to the search it was verified that the automobile was registered to petitioner was false (R. 404-405).

On April 28, 1975, the informer told a DEA agent that he had recently talked to petitioner and inferred from this conversation that the petitioner's alleged smuggling trip would take place "sometime in the next two or three weeks." Based upon his own general knowledge of aviation, the informer told the agent that a roundtrip flight from Melbourne to Colombia, South America, in a Beagle aircraft, would take an estimated sixteen-seventeen hours. Contrary to the government's position, the petitioner's aircraft thus was not landing at "the predicted time and place" when it was sighted on the ground, moving along a taxiway, some fifteen hours after its alleged departure on the morning of May 17, 1975.

It is respectfully submitted that an examination of the transcript of the suppression hearing contained in the record on appeal shows absolutely no evidence to support the objective conclusion that, on the night of the search, the agents observed anything that was inconsistent with completely innocent behavior. The on-the-scene observations by the agents therefore did not provide the necessary guarantees of the informant's reliability and the dependability of his information. Furthermore, this record does not support the conclusion that exigent circumstances existed justifying a warrantless search.

**CONCLUSION**

It is respectfully submitted that both Fourth Amendment questions presented for review in this Court require the granting of this petition for writ of certiorari.

Dated at Orlando, Orange County, Florida, this 4th day of February, 1977.

Respectfully submitted,

/s/ James M. Russ

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